COURT OF APPEALS
DECISION
DATED AND FILED

March 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2341 **Cir. Ct. No. 2012FA000442**

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

IN RE THE MARRIAGE OF:

ELLEN ANDREA GIBBS,

PETITIONER-APPELLANT,

V.

MICHAEL SCOTT GIBBS,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Walworth County: ALLAN B. TORHORST, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Curley, P.J., Brennan, J., and Thomas Cane, Reserve Judge.

¶1 BRENNAN, J. Ellen Andrea Gibbs appeals from her judgment of divorce from Michael Scott Gibbs, contending that the trial court improperly exercised its discretion in: (1) ordering an unequal property division in Michael's favor by awarding Michael all of his pension; (2) finding that Michael did not waste marital assets; (3) holding open, but not setting, a maintenance award to Ellen; (4) failing to find Michael in contempt for failing to pay $8000 temporary maintenance; (5) permitting Michael to testify at the trial by phone from Costa Rica; and (6) failing to award Ellen a contribution to her attorney's fees. Michael responds that the trial court properly exercised its discretion in all respects.

¶2 There is no question that this was a long marriage and that the only significant marital asset at the time of divorce was Michael's pension, which was in active pay status. The trial court found that the marital residence was in foreclosure, and that the parties' debts, exclusive of the pension, exceeded their assets. Neither party disputes that finding. The record shows that neither party presented evidence of the present value of Michael's pension and the trial court made no fact finding as to the pension's value. Nonetheless, the trial court awarded the pension to Michael in its entirety, gave each party the assets and debts in their possession, and created tenancy-in-common in the residence, vacant lot, and boat pier. Ellen does not contend that the other assets, excluding the pension, were unfairly or unequally divided in the first instance. Instead, she argues for some asset/debt reallocation to compensate her for Michael's alleged waste of marital assets.

¶3 We agree with Ellen that in awarding Michael his entire pension, without having any evidence of its value, the trial court improperly exercised its discretion in its property division. As such, we reverse the trial court's order on the pension. Because there is no basis in the record for an other-than-equal

property division, we direct the trial court on remand to divide the pension equally, preferably by a qualified domestic relations order ("QDRO").[1] We affirm the property division order in all other respects. For the reasons which follow, we also affirm the remainder of the trial court findings.

BACKGROUND

¶4 Ellen and Michael were married on October 30, 1982, and had been married just short of thirty years at the time Ellen filed this divorce action. The parties raised two children, who are both adults.

¶5 At the time of the divorce, Ellen was fifty-six and worked part-time at Verve Art Gallery. Ellen worked about nineteen to twenty hours a week, making $10 an hour; her monthly salary was approximately $825. Ellen worked at the time of the marriage but stopped working in 1986 to be a full-time homemaker and to raise the couple's children.

¶6 When Ellen returned to the workforce in 1997, she obtained a real estate license and became a real estate broker, earning just over $100,900 in 2002, her most successful year. Once the real estate market declined, Ellen and Michael agreed that Ellen would not work as many hours. For the next six years, Ellen's income varied from $0 to $10,654 per year. Ellen has no physical, mental, or emotional disabilities preventing her from continuing to work.

[1] The parties do not address, and therefore we do not decide, whether a QDRO is possible when a pension is in active pay status, as Michael's pension is here. If so, that would obviously be the practical way to implement our decision. Given the parties' insolvent marital estate, there does not appear to be any asset(s) available from which Michael can pay Ellen one half of the pension's value. If a QDRO is not possible, we leave the method of implementing our property division order to the trial court.

¶7 Michael was sixty-one and a retired judge at the time of the divorce. At the time of the marriage, Michael worked as a lawyer at a firm in Lake Geneva, until his election to the circuit court in 1992. He served on the circuit court until he retired in July 2010. Michael worked as a reserve judge for a short time after his retirement. He is either currently licensed or eligible for a license to practice law in Wisconsin. He has not worked as a reserve judge since September 2011, and has been unemployed since then. However, there is nothing physically, mentally, or emotionally prohibiting him from working.

¶8 During the couple's marriage, Michael had complete control over the couple's finances. The couple did not have a joint bank account; all of their money went into Michael's private account and he handled all of their finances.

¶9 In 2003, Ellen and Michael secured a line of credit as a lien upon their residence. In March 2010, Michael made two withdrawals from the line of credit, one for $55,000 and one for $50,000; this increased the credit debt from $84,000 to $189,000. Michael made the withdrawals because he believed that the bank was going under and would terminate all lines of credit. The parties have many other debts aside from the credit line.

¶10 Ellen and Michael had planned to perform "missionary work" upon Michael's retirement. During 2010, to facilitate that plan, Ellen and Michael created FOTOS International, LTD., a 26 U.S.C. § 501(c)(3) nonprofit corporation. FOTOS was created to provide funds for their missionary work. In early 2011, Michael travelled to Costa Rica to investigate and consider mission work and business opportunities there. On March 16, 2011, the balance of the FOTOS bank account was $3906.45.

¶11 Between March 16, 2011, and April 20, 2011, multiple deposits, totaling $160,000, were made to the FOTOS account. These deposits were made using funds from the parties' 2003 line of credit. On April 11, 2011, Michael withdrew the entire balance of his deferred compensation fund, $237,000. Michael then transferred the $160,000 in the FOTOS account and the $237,000 recently withdrawn from his deferred compensation account to Banco Nacional de Costa Rica, a bank in Costa Rica.

¶12 When Michael returned from Costa Rica, the parties began to have serious marital issues and eventually the marriage suffered a breakdown. The parties both maintain that they separated in March 2011. Afterwards, Michael returned to Costa Rica and resided there through the date of the trial. During 2011, Ellen first filed, then dismissed, a divorce action. However, Michael returned to Wisconsin for several visits in 2011 and 2012, during which time the parties lived in the same household.

¶13 While Michael was living in Costa Rica, his pension checks were deposited into his Wisconsin bank account, so that he could continue to pay all the household bills in Wisconsin. However, during May 2012, Michael stopped depositing his pension checks into the Wisconsin account and stopped paying bills for the household in Wisconsin. Consequently, Ellen began using her credit card to pay for everything because she did not have any income of her own.

¶14 Ellen filed the petition for divorce at issue in this action in August 2012.

¶15 In November 2012, the court issued an order awarding Ellen temporary occupancy of the homestead, until its sale or foreclosure. The

homestead had no equity. In addition, the court ordered Michael to pay $2000 per month in temporary maintenance to Ellen, beginning in October 2012.

¶16 In May 2013, Ellen filed a motion for contempt because Michael had stopped making his maintenance payments. When the maintenance payments stopped, Ellen was forced to continue paying her bills by charging her credit card, which was already in serious debt. However, because Michael was living in Costa Rica, he was not available for personal service and the motion for contempt was deferred to trial.

¶17 The divorce trial was held on August 2, 2013. The disputed factual issues at trial included Ellen's claim that Michael used the funds that he withdrew from the couple's line of credit and his deferred compensation fund without her knowledge or consent. Ellen claimed that loss of the funds constituted marital waste.

¶18 Michael testified by phone from Costa Rica that while he was in Costa Rica, he became involved in an investment with a "hotel chain deal." He testified that he fully explained to Ellen his purposes for going to Costa Rica, as well as the business opportunity that he had discovered, and that she agreed to the investment. Ellen testified that he did not tell her and she did not agree. The trial court found Michael's testimony more credible than Ellen's testimony.

¶19 The trial court found that almost all of the money that Michael transferred to his account with Banco Nacional de Costa Rica was lost in the hotel investment in July 2011. The little money that was not lost Michael used to help people in Costa Rica, pursuant to the purpose of FOTOS. The trial court found that most of the money that was spent from the line of credit was not spent on the hotel investment, but on the family's needs, including: new vehicles, their son's

election campaign, and "other family needs." At the time of this divorce, Michael had $3000 leftover in the FOTOS account.

¶20 The trial court rejected Ellen's argument that Michael's loss of the money in the hotel deal amounted to marital waste, finding that Ellen was aware of and approved of Michael's plans for these funds. The trial court further noted that the funds were spent prior to the one-year look back period set forth in WIS. STAT. § 767.63 (2013-14).[2]

¶21 On August 2, 2013, after taking evidence from both parties, the trial court granted the divorce and later issued a written decision. The trial court held open the issue of maintenance, found that Michael did not engage in waste, denied Ellen's request for attorney's fees, and allocated the parties' assets and debts. The trial court set forth each party's assets in Exhibit C and each party's debts in Exhibit D. The Exhibits were attached to the trial court's written order. Michael's pension was not included as an asset in Exhibit C. Nonetheless, the trial court awarded Michael's pension to him, and named Ellen the sole beneficiary in the event of his death.

¶22 The trial court determined that Ellen is capable of gaining employment to increase her earnings to $25,000 or more per year by working full time at $12 per hour. The court made no finding as to Michael's income earning capabilities other than to note that Michael is retired, would be receiving his pension, which was then $4366.98 per month, but would be decreased to $3130.65

[2] All references to the Wisconsin Statutes are to the 2013-14 version.

per month in July 2014 when Michael turned sixty-two. The trial court noted that Michael still possessed a license to practice law in Wisconsin.

¶23 The trial court did not specifically rule on Ellen's motion for contempt for Michael's non-payment of maintenance, but did order that the temporary maintenance balance due at the time of divorce was $8000 and was to be paid out of the sale of the first parcel of property.

¶24 Ellen appeals.

DISCUSSION

¶25 We review each of Ellen's claims for an improper exercise of discretion. "A [trial] court erroneously exercises its discretion if it makes an error of law or neglects to base its decision upon facts in the record." ***King v. King***, 224 Wis. 2d 235, 248, 590 N.W.2d 480 (1999). A proper exercise of discretion "'must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.'" ***Id.*** (citations omitted). Whether the trial court erroneously exercised its discretion is a question of law that we review *de novo*. ***Id.*** We address each of Ellen's arguments in turn.

1. *Property Division: The trial court improperly exercised its discretion in awarding Michael his entire pension.*

¶26 Ellen argues on appeal that the trial court improperly exercised its discretion in the property division when it awarded Michael his entire pension after first equally dividing the rest of the parties' assets and debts as listed in Exhibits C and D. Michael's pension was not listed as an asset in Exhibit C.

Ellen argues there are no WIS. STAT. § 767.61(3) factors that would favor an unequal division of the pension.

¶27 Ellen also claims that the trial court compounded that error by failing to include the pension's value in the marital estate. *See* ***Steinke v. Steinke***, 126 Wis. 2d 372, 381, 376 N.W.2d 839 (1985) ("As with other property constituting the marital estate, the value of the pension interest must be included in the property division."). It is undisputed that there was no evidence in the record of the present value of Michael's pension; yet, the trial court awarded the pension in its entirety to Michael. Therefore, Ellen requests an equal division of the pension by QDRO.

¶28 Michael argues that the trial court complied with ***Steinke*** by *considering* Michael's pension, albeit without knowing its present value, but that the court decided on an unequal marital property division after also considering the WIS. STAT. § 767.61(3) property division factors, such as: length of marriage, parties' ages and health, their income and expenses, and their earning capacities. Michael also relies on our decision in ***Herdt v. Herdt***, 152 Wis. 2d 17, 447 N.W.2d 66 (Ct. App. 1989), which gives the trial court discretion to make an unequal property division for good reasons, *see* ***id.*** at 22. Michael notes that the court did award Ellen her own retirement accounts—they were listed and valued as one of Ellen's assets in Exhibit C—and took into consideration that Michael had given Ellen the survivorship benefit to his pension. But even Michael acknowledges that the court made no finding as to the values of either his pension or the survivorship rights to the pension and the parties did not supply the court with values for either.

¶29 WISCONSIN STAT. § 767.61(1) requires a court to divide the parties' marital property. Michael makes no claim that any part of his pension is not marital property. It is well-settled law in Wisconsin that the value of a person's pension must generally be included in the property division. ***Steinke***, 126 Wis. 2d at 380-81. And while it is true that the trial court has discretion to use the pension for *either* property division *or* maintenance, it cannot be used for *both* purposes. *See* ***Schinner v. Schinner***, 143 Wis. 2d 81, 99, 420 N.W.2d 381 (Ct. App. 1988). Both parties agree on appeal that the trial court awarded Michael's pension to him as part of the property division, not maintenance. A trial court is to presume that all marital property should be divided equally, although the court may deviate from an equal division after consideration of the statutory factors. *See* § 767.61(3); *see also* ***Dutchin v. Dutchin***, 2004 WI App 94, ¶20, 273 Wis. 2d 495, 681 N.W.2d 295 ("[T]rial courts are afforded the discretion necessary to render equitable and fair results.").

¶30 Here, the trial court said it was attempting an equal division of property. But it also said that it found that difficult to do given several factors, including: the poor quality of the asset value evidence, the prospect of foreclosure and deficiency judgment on the residence, and the general nature of the marital estate where debts exceeded asset values.[3] The trial court disregarded the parties' "worthless" estimates of the values of the parties' real estate (residence, vacant lot,

[3] We recognize that the trial court's job was made considerably more difficult by the parties' collective failure to supply the court with the value of Michael's pension. The parties' failure to provide the trial court with the information it needed is especially troublesome given that one of the parties is a retired circuit court judge. However, while we understand a trial court's inclination to assist the parties in ending the divorce action, despite their lack of trial preparation and failure of proof, a fair property division cannot be achieved without a proper valuation of a significant asset.

and pier) and relied instead on the equalized assessed value obtained from the tax bills. The trial court noted that the residence was in foreclosure and had outstanding liens, a mortgage, a line of credit obligation, and unpaid taxes. With no "hard" numbers, the court found that the residence would be foreclosed and "probably" result in a deficiency judgment to be entered against both parties.

¶31 The trial court also found in at least three locations in its findings of fact that the parties' debt liability exceeded their assets' values. Yet, the court noted, with apparent frustration, that the parties both continued to incur debt. The court observed "that the parties chose to punish each other rather than to realistically assess their position with regards to their assets and debts at the commencement of the divorce."

¶32 After dividing the assets and debts in Exhibits C and D as equally as it could, the court awarded Michael his entire pension, which was not listed as an asset in Exhibit C. This, both parties agree, created an unequal property division award, one which Michael finds defensible and Ellen does not. Notably, neither party claims the asset and debt allocation in Exhibits C and D was an improper exercise of discretion.[4] It is the award of the pension to Michael that both agree created the unequal division. We presume then that Exhibits C and D represent an equal division of the marital estate, exclusive of the pension.

¶33 Because the trial court equally divided the marital estate in Exhibits C and D, which did not include Michael's pension, we conclude the trial court

[4] Ellen does make a related argument, which we address below, that the court should depart from an equal division of the marital estate and award her additional assets to compensate her for the wasted funds Michael spent on an unsuccessful hotel investment in Costa Rica.

erred in awarding the pension in its entirety to Michael. Therefore, we remand this case back to the trial court to equally divide the pension. If it is possible to divide a pension in active pay status by QDRO, (and the parties do not address that question),[5] then valuation is not necessary and we direct that a QDRO be effectuated. If it is not possible, then we direct that the pension be valued and equally divided by some other means.

2. *The trial court did not erroneously exercise its discretion in concluding that Michael had not wasted marital assets.*

¶34 In a related property division claim, Ellen contends that the trial court improperly exercised its discretion in concluding that Michael did not commit waste of marital assets. Ellen argues that the record shows that Michael spent over $300,000 of marital funds, without her knowledge or consent, for his own purposes. She contends that the $300,000 constitutes "waste" under WIS. STAT. § 767.63 and entitles her to allocation of half of the "wasted" $300,000 in the form of other assets. Michael responds that the trial court's waste decision was properly based on the facts in the record, the court's credibility determinations, and the correct law, and therefore, should be affirmed.

¶35 Wisconsin law permits a trial court to depart from the presumptive equal division of the marital estate where there has been "squandering of the parties' assets, or the intentional or neglectful destruction of property." ***Anstutz v. Anstutz***, 112 Wis. 2d 10, 12, 331 N.W.2d 844 (Ct. App. 1983). Whether there has been waste or squandering of marital assets is a discretionary determination by the trial court. *See* ***id.*** at 11-13. Upon review, "[w]e will not reverse a discretionary

[5] See footnote 1 above.

determination by the trial court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987). We search the record for evidence to support the findings reached by the trial court. *See* ***Covelli v. Covelli***, 2006 WI App 121, ¶14, 293 Wis. 2d 707, 718 N.W.2d 260. We need not agree with the trial court's exercise in order to sustain it. ***Independent Milk Producers Co-op v. Stoffel***, 102 Wis. 2d 1, 12, 298 N.W.2d 102 (Ct. App. 1980).

¶36 WISCONSIN STAT. § 767.63 creates a rebuttable presumption that any asset with a fair market value of $500 or more is *part of the divisible marital estate* if it was "transferred for inadequate consideration, wasted, given away, or otherwise unaccounted for by one of the parties *within one year prior to the filing of the petition* or the length of the marriage, whichever is shorter."[6] ***Id.*** (emphasis added). The one-year time frame is not determinative. We have made clear that regardless of whether the waste occurred within one year of the filing of the divorce, the trial court has the authority to treat the wasted assets as part of the

[6] WISCONSIN STAT. § 767.63 states, in relevant part:

> **Disposed assets may be subject to division.** In an action affecting the family, except an action to affirm marriage under s. 767.001(1)(a), any asset with a fair market value of $500 or more that would be considered part of the estate of either or both of the parties if owned by either or both of them at the time of the action and that was transferred for inadequate consideration, wasted, given away, or otherwise unaccounted for by one of the parties within one year prior to the filing of the petition or the length of the marriage, whichever is shorter, is rebuttably presumed to be property subject to division under s. 767.61 and is subject to the disclosure requirement of s. 767.127…

divisible marital estate. ***Derr v. Derr***, 2005 WI App 63, ¶65, 280 Wis. 2d 681, 696 N.W.2d 170.

¶37 Ellen claims that Michael made various withdrawals from marital assets, transferred them to a bank account over which he had exclusive control, and then invested them unsuccessfully in a hotel in Costa Rica, all without her knowledge and consent. Specifically, Ellen testified at trial that in January 2011, Michael withdrew the entire amount from his deferred compensation fund, valued at $237,000 by the trial court.[7] She also testified that starting in March 2010, Michael made the first of several withdrawals from the parties' home equity line of credit, ultimately withdrawing a total of $189,000, as valued by the trial court. She argues that Michael first placed those funds in a bank account over which he had exclusive control, then transferred $160,000 on April 4, 2011, to his account in Costa Rica and $77,000 to that account on May 2, 2011. Ellen contends she only became aware of the home equity line of credit withdrawal in March 2011, one year after the withdrawal. She says she did not learn of the deferred compensation fund withdrawal until March 2011. The remedy Ellen seeks is not the return of those sums of money, because she views that as hopeless, but rather a deviation from the asset/debt allocation in Exhibits C and D, giving her a few more assets and freeing her from some of the debts.

¶38 Michael argues that the trial court should be affirmed in its finding that there was no waste because the finding is not clearly erroneous. He does not dispute making the withdrawals from his deferred compensation fund or from the

[7] Ellen concedes in her brief that, after taxes, Michael received only $195,814.15 from his withdrawal from the deferred compensation account.

home equity line of credit. Nor does he dispute transferring the funds to his bank account in Costa Rica. Rather, Michael contends here, as he did below, that during the marriage Ellen left all of the financial decisions to him. He does not dispute that Ellen learned of some of his financial decisions after-the-fact, because that was their practice during the marriage. Michael testified that some of the money was used on their son's election campaign and their daughter's wedding. Michael also testified at trial that he did discuss with Ellen ahead of time the missionary work, investing in charitable projects in Costa Rica, and the hotel investment in Costa Rica, where the bulk of the funds were lost. He testified that she agreed to each.[8]

¶39 Ellen agreed at trial that it was their practice during the marriage for Michael to handle all of their money and that she trusted him. However, she disputed that any of the challenged funds went to their son or daughter because their son's campaign was in 2010 and their daughter's wedding was in 2009, that is, both events occurred prior to Michael's withdrawals from the deferred compensation fund and from the home equity line of credit. Ellen also contends that Michael never discussed the hotel investment with her.

¶40 The trial court found that Michael's testimony was more credible and that Ellen knew and approved of Michael's use of his deferred compensation fund and the home equity line of credit. The trial court was in a better position

[8] We note that Michael's testimony about the hotel investment was short on details and proof. He, a retired circuit court judge, testified that he invested $165,000 in a hotel project in Costa Rica, but he could not remember the name of the attorney who assisted him with the investment and provided no documentation of the investment at trial. Nonetheless, the trial court believed Michael's testimony and made specific findings as to why. We need not agree with the trial court's ruling to sustain it. *See* ***Independent Milk Producers Co-op v. Stoffel***, 102 Wis. 2d 1, 12, 298 N.W.2d 102 (Ct. App. 1980).

than this court to determine credibility. *See* ***Covelli***, 293 Wis. 2d 707, ¶14. The key to whether Michael's use of the marital assets constituted waste was whether Ellen knew and approved. Resolution of that issue depended on who the trial court believed. It believed Michael. With regard to the parties' credibility on the issue of waste, the trial court found:

- that Michael's testimony—that he lost the funds derived from his deferred compensation fund and the home equity line of credit on a failed hotel chain investment, which he made in April 2011, more than one year before the divorce filing—was credible;

- that some of the funds were spent assisting poverty-stricken individuals in Costa Rica pursuant to the purpose of FOTOS more than one year before the divorce filing;

- that a substantial portion of the funds from the home equity line of credit was spent on the family's needs after discussion with Ellen;

- that Ellen's testimony—that she was unaware of the hotel investment—was unsupported in the record; and

- that "the hotel chain investment may be deemed naive, inexperienced or risky, but was not waste."

¶41 The trial court's findings are not clearly erroneous. The court considered all of the testimony and where there was a dispute in the testimony—

for instance, Ellen's testimony that she was not consulted about the hotel investment and Michael's testimony that he told her—the court found Michael more credible than Ellen. Credibility determinations are the sole province of the trial court. *See* ***Covelli***, 293 Wis. 2d 707, ¶14. The court stated its reasoning clearly on the record and applied the correct law for a proper exercise of discretion. *See* ***Prahl***, 142 Wis. 2d at 667. There is a basis for the trial court's credibility call and, therefore, we uphold its findings.

¶42 Ellen's second argument regarding the allegedly wasted assets is that the trial court erred by applying the incorrect law. She argues that the court apparently believed that it *could not* add the allegedly wasted funds into the marital estate because Michael's use of the funds fell outside the one-year time period of the statute. *See* WIS. STAT. § 767.63. However, under Wisconsin case law, the trial court clearly has the discretion to add the wasted assets back into the estate *even if* the waste occurred more than one year prior to the divorce filing. *See* ***Derr***, 280 Wis. 2d 681, ¶65.

¶43 It is true that the trial court was not very clear as to whether it understood that the one-year time frame did not limit its discretion to add the asset back in. First, the trial court stated: "The Court finds that the hotel chain investment may be deemed naive, inexperienced or risky, but was not waste by the respondent … and *is not divisible* by the parties in this divorce." (Emphasis added.) But the court also stated that the allegedly wasted property is "not property that *must* be included in the ownership of one or either of the parties for purposes of division in this proceeding." (Emphasis added.)

¶44 We conclude that these two findings, when read together and in context, show that the court realized that it *had* the discretion to add the assets

back in, but because it did not believe Ellen's claimed lack of knowledge and consent, *chose* not to. In addition, the entirety of the court's findings makes it abundantly clear that the court's waste finding was not based on the *timing* of the hotel investment, and therefore, WIS. STAT. § 767.63 is not implicated, but on its *credibility* determination that Michael and Ellen jointly agreed to put the funds toward missionary work, a hotel investment, as well as expenditures for their children. Accordingly, we affirm the court's marital waste decision.

3. *The trial court did not err in holding open maintenance to Ellen.*

¶45 Ellen contends that the trial court improperly exercised its discretion by not awarding her maintenance, although the court did hold maintenance open. Ellen argues that the trial court wrongly imputed income to her, in excess of the part-time minimum wages she was earning, without imputing any income to Michael, who was retired, but maintained a law license. She argues that even if this court reverses the trial court's award of his pension to Michael, as we have above, she should still receive maintenance because Michael is capable of practicing law again and earning up to $50,000 a year.

¶46 Michael counters that the trial court properly considered the maintenance factors of WIS. STAT. § 767.56, and therefore, did not err in not awarding maintenance.

¶47 The trial court has discretion to award maintenance. ***Steinke***, 126 Wis. 2d at 386. In fashioning a maintenance award, the court must consider the factors in WIS. STAT. § 767.56(1c):

> (a) The length of the marriage.
>
> (b) The age and physical and emotional health of the parties.

> (c) The division of property made under s. 767.61.
>
> (d) The educational level of each party at the time of marriage and at the time the action is commenced.
>
> (e) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
>
> (f) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
>
> (g) The tax consequences to each party.
>
> (h) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, if the repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
>
> (i) The contribution by one party to the education, training or increased earning power of the other.
>
> (j) Such other factors as the court may in each individual case determine to be relevant.

¶48 The purpose of maintenance in a long marriage is to allow the parties to enjoy the same standard of living they enjoyed during the marriage and general fairness. ***LaRocque v. LaRocque***, 139 Wis. 2d 23, 32-33, 406 N.W.2d 736 (1987). On review, we must consider whether the trial court applied the above factors, and if so, whether it considered both the support and fairness

objectives of maintenance. ***Forester v. Forester***, 174 Wis. 2d 78, 84-85, 496 N.W.2d 771 (Ct. App. 1993).

¶49 There is no dispute with the trial court's findings that this was a long marriage, thirty years, and that Ellen's income changed during the marriage with both parties' consent, dropping from her high in 2002 of $100,900, when she was a real estate broker, to her part-time earnings at an art gallery of $825 monthly at the time of the divorce. She was fifty-six at the time of the divorce and she has no physical, mental, or emotional disabilities that would prevent her from continuing to work.

¶50 Similarly, there is no dispute with the trial court's findings that Ellen and Michael agreed, prior to the divorce, that Michael would retire from his job as a circuit court judge. He retired as a judge in July 2010 and did some reserve judge work until September 2011. At the time of the divorce, Michael was sixty-one years old, unemployed, still had the ability to practice law, and had no physical, mental, or emotional disabilities that would prevent him from continuing to work.

¶51 We conclude with respect to maintenance, other than when imputing income to Ellen and not to Michael, that the trial court properly exercised its discretion and considered the proper statutory factors. It took into consideration the length of their marriage, their ages, income, and health. It specifically noted their joint agreement to create the financial situation they were in at the time of divorce, stating: "Due to decisions made by the parties in 2010 and 2011 their lifestyle changed; and until their debts are paid or discharged there is little income for either party to resume their former living style." While the trial court may have erred in imputing income to Ellen and not to Michael, that error does not

require reversal of the maintenance hold-open to Ellen due to our property division order above, the insolvency of the marital estate, and the agreement of the parties to retire and do missionary work as outlined below.

¶52 We agree with the trial court that the parties' decisions during the marriage have made it impossible to fashion a maintenance order that would allow them to enjoy the same standard of living as they had during the marriage. The parties agreed before the divorce filing that Michael would retire. Both were going to do missionary work. They lost their savings, incurred debt in excess of their asset values, and are now left with only Michael's monthly pension payment, which we have divided equally between them. Everything they have has now been equally divided.

¶53 Yet, Ellen seeks a maintenance order to be funded by an order that Michael return to the practice of law. We see no fairness in that given their mutual agreement during the marriage as discussed above. The parties' income and retirement agreements prior to the divorce filing support the trial court's decision not to make a specific award at this time. *See* WIS. STAT. § 767.56(1c)(h) & (j). The court's decision to leave maintenance open was proper as well because the record reflects their financial uncertainty and Michael's far greater income potential.[9] Thus, we affirm the court's maintenance award, albeit with different reasoning.

[9] Of course, any substantial change in the parties' income may result in the imposition of a maintenance order. *See* WIS. STAT. § 767.59.

4. *The trial court did not err when it did not explicitly find Michael in contempt.*

¶54 Ellen argues that the trial court erred in not finding Michael in contempt for his admitted failure to pay $8000 in temporary maintenance as of the date of divorce. The trial court agreed that that sum was due but did not explicitly call Michael's failure to pay "contempt." Rather, the court just ordered the amount paid out of the sale of the first parcel of land, stating: "[Michael] shall be responsible for maintenance not paid as ordered on a temporary basis; the sum shall be taken from his share of the proceeds from the sale of the first parcel of land that is sold." Ellen argues the court's decision was an error because she does not want to wait for the sale of the first parcel of land. She wants the past due temporary maintenance ordered payable forthwith.

¶55 Although Ellen characterizes Michael's failure to pay maintenance as "contempt," she does not develop an argument for contempt. We will not develop her argument for her. *See* ***Vesely v. Security First Nat'l Bank of Sheboygan Trust Dep't***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985) (we do not decide inadequately briefed arguments). What Ellen really seeks is an order for immediate payment of the $8000. We understand her impatience. This money was due long ago, and Michael testified at trial that he knew he was obligated to pay maintenance, was paying, but chose to stop without court authority because he thought his wife was going to sell marital property. He did not claim any inability to pay.

¶56 We conclude that the trial court properly considered those undisputed facts and properly ordered Michael to pay. But given the marital estate's insolvency and the very modest income Michael will receive from his half of the pension, we affirm the trial court's conclusion that there is no other source

from which Michael could pay this past-due maintenance any earlier. Thus, we affirm this part of the order.

5. *The trial court did not erroneously exercise its discretion in permitting Michael to testify by phone.*

¶57 Ellen acknowledges that WIS. STAT. § 807.13(2) gives the trial court the discretion to permit telephonic testimony, but argues that under WIS. STAT. § 767.235(2), the trial court erred in proceeding with the trial in Michael's absence despite his telephonic testimony. However, Ellen presents no analysis of how the trial court violated the statute, and we will not develop her argument for her. *See* ***Vesely***, 128 Wis. 2d at 255 n.5 (we do not decide inadequately briefed arguments).

¶58 Ellen quotes the trial court's pretrial order in which it expressly permitted Michael to appear by phone, while encouraging him to appear in person. The trial court stated: "If he does not appear personally, my position would be he better be prepared to appear telephonically." Based on that language, Ellen complains that "Ellen's counsel assumed that Michael would be required to appear at the trial in person." Perhaps counsel so assumed. But as the quoted pretrial order shows, counsel was in error, not the trial court.

6. *The trial court did not erroneously exercise its discretion in denying Ellen's request for contribution to her attorney's fees.*

¶59 Ellen does not dispute that Wisconsin law with regard to contribution to attorney fees requires the trial court to find that the spouse being ordered to pay the contribution has the ability to pay. *See* ***Kastelic v. Kastelic***, 119 Wis. 2d 280, 290, 350 N.W.2d 714 (Ct. App. 1984). Assuming without deciding that Ellen has shown that her attorney's fees were reasonable and that she

has need for contribution, the record is very clear here that Michael lacks the ability to pay a contribution.

¶60 For all of the foregoing reasons, we reverse the trial court's property division order and remand it to the trial court with directions to equally divide the pension. We affirm all other orders of the trial court.

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

Not recommended for publication in the official reports.