COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1588 **Cir. Ct. No. 2003FA153**

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

IN RE THE MARRIAGE OF:

TONY K. STEINMANN,

PETITIONER-RESPONDENT,

V.

ROSE M. STEINMANN,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed*.

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 NETTESHEIM, J. After an eight-day bench trial, Rose and Tony Steinmann's ten-year marriage was dissolved by divorce in December 2004. The property division involved substantial assets, many of them funded by Rose's significant earnings from her cheese brokerage business. The main issues on appeal pertain to Rose's challenges to the maintenance she was ordered to pay Tony, and to the property division, which Rose asserts, pursuant to the parties' marital property agreement, should have involved tracing current assets to their source.

¶2 We first compliment the trial court on its comprehensive and well-reasoned written decision. Its near-textbook thoroughness and clarity immensely aid review in a case such as this. We see no erroneous use of the trial court's discretion in ordering maintenance. We also hold that the tracing exercise Rose urges is unwarranted. She reclassified her individual property when she used it to purchase assets she titled jointly with Tony. Therefore, we affirm.

BACKGROUND

¶3 The relevant facts are not in dispute. Tony and Rose married in 1994. The marriage produced no children; Tony has two from a prior marriage. Tony is forty-four years old. He has a GED and has taken various agricultural courses. The son of a master cheesemaker, he himself is a licensed cheesemaker and has been involved in the cheese business virtually his whole adult life. At the time of the divorce, Tony was a sales representative for his brother's cheese business making $85,000 a year. Rose, fifty-one, attended college but does not hold a degree. She is the sole owner and president of Dairy Source, Inc., a cheese brokerage and distribution company. At the time of the divorce, her annual salary from Dairy Source was reported to be $140,000.

¶4 About a year before their marriage, the parties bought as tenants in common a residence in Delavan, Wisconsin. Tony contributed about $10,000, Rose $39,000, toward the $49,000 down payment. Improvements to the Delavan house were funded largely by money from an M&I savings account held in Rose's name. This account was referred to at trial as "the 1114 account." Except for $12,000 and some income tax money contributed by Tony, the 1114 account was funded by Rose's income from Dairy Source, the approximately $275,000 net proceeds from the sale of the Delavan property, and the sizeable settlement from a lawsuit, which we will later discuss.

¶5 In May 2001, the parties purchased an unfinished home on Lake Geneva for $2.2 million. The deed recites that they bought it as survivorship marital property and Tony was a joint obligor on the mortgage. Rose testified that she alone made the decision to jointly title the property for the sole purpose of survivorship to Tony, not to gift him half the interest in the home. The parties also acquired waterfront property on Lake Michigan and Marco Island, Florida, and two boat slips at the Marco Island yacht club, all purchased in both their names as "husband and wife." Rose also testified that the titling reflected "estate planning," not an intent to gift a marital interest in any of the properties. Rose paid cash for the Marco Island property and the boat slips from her Dairy Source income deposited in the 1114 account. Tony did not contribute to the purchase, subsequent taxes or upkeep of these assets.

¶6 The parties also titled in both their names a Corvette, an SUV, a pontoon boat, another boat and a four-wheel-drive ATV. A private plane and a series of yachts also were available for their use through Dairy Source. These purchases, including the Lake Geneva house, primarily were made by Rose or Dairy Source from the 1114 account.

¶7 In early 1995, the parties executed a Limited Marital Property Classification Agreement (the Agreement) which provided that all assets owned by each party were to remain that party's individual property. In addition, either party's individual earnings after the date of the marriage also were classified as individual property. Rose's spendable income throughout the marriage far exceeded Tony's. Between 1996 and 2002, Rose's was $873,645 to Tony's $120,687.[1] Each had a separate account into which they deposited their respective incomes. As stated, Rose deposited hers into the 1114 account.

¶8 Tony filed for divorce in February 2003. In May, a family court commissioner issued a temporary order that Rose pay Tony, then unemployed after being fired from Dairy Source, $5250 monthly maintenance and granting Rose temporary use of the Lake Geneva residence. In November, the family court reduced maintenance to $1875 per month.

¶9 In early 2004, as the result of some preliminary proceedings, the trial court determined that the parties' Agreement was valid and enforceable, and therefore binding for purposes of property division pursuant to WIS. STAT. § 767.255(3)(L) (2003-04).[2] In addition, by written decision dated June 29, 2004, the trial court vacated both temporary maintenance awards, ordered Tony to repay the $28,956 maintenance payments Rose already had made, and ordered the sale of the Lake Geneva residence because it was a drain on marital assets. The court summarily denied Rose's request to reconsider the order directing the sale of the

[1] Tony testified that at one point he and Rose devised a way to artificially minimize his salary so as to reduce his support obligation for the children of his prior marriage.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

residence. In October, upon Rose's continued refusal to vacate the home and list it for sale, Rose was held in contempt of court and ordered to jail for six months. Dairy Source bought the house in November for $3.2 million for Rose's use, thereby sparing Rose the contempt sanction.

¶10 The trial spanned eight days. At trial, Dennis Mahoney, one of Rose's experts, testified that a tracing exercise he had performed demonstrated that Rose's income almost entirely funded the purchases of the Lake Geneva property, the waterfront lots, the boat slips, the Corvette, the ATV and the fishing boat. Mahoney opined that Rose merely had loaned her funds for the purchase of those items but had not transferred ownership, and the assets therefore should be returned to Rose. Tony's expert opined that while Rose's expert's approach was mathematically sound, it was conceptually flawed because it overlooked substantial activity in Rose's ostensibly individual account, ignored Tony's contribution of personal labor to the properties and, when tracing assets, relied on Rose's statements as to their origin.

¶11 For a time during their marriage, Tony was employed by Berner Cheese Company, which purchased its raw materials through Dairy Source. In 1999, Tony left Berner Cheese to work for Dairy Source. A lawsuit between Berner Cheese and Dairy Source, Tony and Rose was settled in April 2000 resulting in a $1.35 million payment to Dairy Source, Tony and Rose. The settlement was not reported on Rose's or Tony's income tax return. An IRS audit was underway at the time of the divorce trial, evidently spurred by the parties' characterization of the settlement as having resulted from a personal injury, so as to avoid taxes. The audit report reflected a more than $1.9 million underpayment (tax plus interest) by Tony and Rose for tax year 2000. Another of Rose's experts, George Kiskunas, testified that the entire settlement was intended to compensate

only Dairy Source for damage to its business and assets, and predicted that the IRS would ultimately determine that the settlement belonged only to Dairy Source. Tony offered no rebuttal evidence, but argued that the settlement release spoke for itself and that he, Rose and Dairy Source all had signed off on it. The trial court declined to decide the tax issue on the merits or to speculate as to how the IRS ultimately would resolve it.

¶12 The trial court granted the divorce on December 17, 2004. In a twenty-three-page opinion, the trial court thoroughly assessed Tony's request for maintenance, property division, and attorney fees. The court awarded Tony maintenance of $2000 per month for ten years, the approximate length of the marriage. Reiterating that the Agreement was valid and enforceable, the court evaluated the parties' marital property in the context of the WIS. STAT. § 767.255(3) factors, and applied the statutory presumption of equal division. It rejected as unsupported in law Rose's contention that property the parties acquired using her individual assets, though jointly titled, should be traced back to its individual property source and therefore awarded to her. The court also found incredible certain of Rose's testimony. Finally, the court declined to find that Tony engaged in overtrial and therefore denied Rose's request for an attorney fee contribution. Later, the court summarily denied Rose's motions for reconsideration of the maintenance award and property division and for a stay pending appeal. Rose appeals. More facts may be added as needed.

DISCUSSION

Property Division

¶13 Rose first challenges the trial court's property division rulings. She does not contest the validity or enforceability of the parties' Agreement; instead she argues that the trial court did not properly uphold it. She contends that because the Agreement specifically lists the instances where title controls, tracing is mandated in all other situations. She submits that when the trial court refused to trace current assets to identify their origin, it essentially rewrote the Agreement by classifying assets based on title rather than source of funds.

¶14 Property division at divorce is governed by WIS. STAT. § 767.255.[3]

[3] WISCONSIN STAT. § 767.255 provides in relevant part:

> **767.255 Property division. (1)** Upon every judgment of annulment, divorce or legal separation … the court shall divide the property of the parties and divest and transfer the title of any such property accordingly….
>
> ….
>
> **(3)** The court shall presume that all property not described in sub. (2)(a) [acquisition by gift or inheritance] is to be divided equally between the parties, but may alter this distribution … after considering all of the following:
>
> (a) The length of the marriage.
>
> (b) The property brought to the marriage by each party.
>
> (c) Whether one of the parties has substantial assets not subject to division by the court.
>
> (d) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.
>
> (e) The age and physical and emotional health of the parties.
>
> (f) The contribution by one party to the education, training or increased earning power of the other.
>
> (g) The earning capacity of each party, 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 become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.
>
> (h) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement for the greater period of time.
>
> (i) The amount and duration of an order under s. 767.26 granting maintenance payments to either party, any order for periodic family support payments under s. 767.261 and whether the property division is in lieu of such payments.

(continued)

Waln v. Waln, 2005 WI App 54, ¶8, 280 Wis. 2d 253, 694 N.W.2d 452. Since none of the parties' property was acquired through gift or inheritance, all is presumptively equally divisible. *See* § 767.255(3). However, this presumption may be altered after considering various factors. ***Id.*** The party asserting that property or part of its value is exempt from division has the burden of showing its nondivisibility at divorce. ***Derr v. Derr***, 2005 WI App 63, ¶11, 280 Wis. 2d 681, 696 N.W.2d 170.

¶15 A trial court's decision on how to divide divisible property generally is within its sound discretion. ***Id.***, ¶9. We will affirm a property division award that represents a rational decision based on the application of the correct legal standards to the facts of record. ***Rumpff v. Rumpff***, 2004 WI App 197, ¶27, 276 Wis. 2d 606, 688 N.W.2d 699. Determining whether property is subject to division in the first instance, however, involves the application of WIS. STAT. § 767.255(2) to uncontested facts and calls into play the trial court's consideration of the Agreement under § 767.255(3)(L). The interpretation of a statute presents a question of law that we review independently. *See* ***Waln***, 280 Wis. 2d 253, ¶7.

> (j) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.
>
> (k) The tax consequences to each party.
>
> (L) Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.
>
> (m) Such other factors as the court may in each individual case determine to be relevant.

Likewise, the construction of a marital property agreement, a contract, is a question of law. ***Gardner v. Gardner***, 190 Wis. 2d 216, 240, 527 N.W.2d 701 (Ct. App. 1994). Accordingly, we review de novo the trial court's threshold determination of whether given property was divisible marital property. *See* ***Waln***, 280 Wis. 2d 253, ¶7.

¶16 As noted, among the statutory factors a court must consider is any written agreement concerning any arrangement for property distribution. WIS. STAT. § 767.255(3)(L). If equitable, such an agreement is binding upon the court. ***Id***. Rose's and Tony's Agreement provides in relevant part:

> **IT IS HEREBY AGREED AS FOLLOWS:**
>
> 1. The parties agree that all of the assets on Exhibit "A" shall be classified as marital property and all of the assets on Exhibit "B" shall be classified as SURVIVORSHIP marital property and all of the assets on Exhibit "C" shall be the individual property of each party as DESIGNATED thereon.
>
> ….
>
> **9. The parties agree that this Agreement will be binding on the issue of property division in the event of the Divorce of the parties hereto.**

¶17 Exhibit "A" listed as marital property the Delavan residence and its furnishings, an Aid Association for Lutherans mutual fund, and a checking account. Exhibit "B" listed as survivorship marital property only "Personal Effects of either Individual Party to the other Party." The parties' Individual Property detailed in Exhibit "C" included "all income earned … together with all assets acquired or income derived therefrom" and "[a]ll property acquired with any Individual Property or acquired in exchange for any Individual Property or acquired from the proceeds of sale of any Individual Property."

¶18 Guided by the Agreement's property classification, the trial court first addressed the individual property recited in the Agreement, and then turned to the division of the marital property under WIS. STAT. § 767.255(3). The court began, as directed, with the presumption of equal division and then thoroughly considered the statutory factors. None persuaded the court to veer from the statutory presumption of equal division. It determined that the Delavan and Lake Geneva homes, the waterfront lots and the two boat slips were marital property, and the proceeds from their sales were to be equally divided. A Thrivent financial account and various boats and vehicles also were deemed to be marital property; each party was to receive half the value of each asset. Dairy Source, Rose and Tony each were awarded an undivided one-third interest in the Berner Cheese settlement. Finally, Rose was to pay Tony an equalizing payment once their jewelry and household items were divided.

¶19 Because the Agreement provides that her Dairy Source earnings and all assets acquired with those earnings are individual property, Rose maintains the trial court was required to trace the jointly held assets to the source of the funds used to acquire them. She argues that the Agreement implicitly mandates tracing because it specifies when classifying by title is contemplated: life insurance policies, IRAs, pension accounts, deferred employment benefits, stocks, mutual funds and other investments all are individual property "regardless of the type of funds contributed." Therefore, Rose deduces, fidelity to the Agreement requires that the source of funds determine an asset's classification and resulting distribution. Rose's expert, Dennis Mahoney, an attorney and certified public accountant, testified that if a party's individual property could be traced, it was to be returned to that party at divorce. He traced to Rose's individual property

between 92.71% and 100% of the money used to purchase the waterfront properties, the Marco Island boat slips and the Lake Geneva residence.

¶20 The trial court acknowledged that some of Rose's individual property was used to purchase various assets, but expressly refused to engage in a tracing expedition. Rose could cite no case law, and the court knew of none, to support tracing individual assets which were not gifted or inherited. The court also observed that even Mahoney conceded that in divorce law tracing applies only in the context of gifted or inherited property. Looking to cases addressing transmutation of gifted or inherited property, the court stated that by titling the assets in both names, Rose made gifts to Tony, thereby transmuting her individual property into marital property. *See* ***Brandt v. Brandt***, 145 Wis. 2d 394, 410-11, 427 N.W.2d 126 (Ct. App. 1988) (retitling inherited individual property may transmute it into marital property and makes donative intent relevant); *see also* ***Weiss v. Weiss***, 122 Wis. 2d 688, 365 N.W.2d 608 (Ct. App. 1985) (gifted property); and ***Bonnell v. Bonnell***, 117 Wis. 2d 241, 344 N.W.2d 123 (1984) (inherited property).

¶21 We do not deem it necessary to look to cases addressing disputes over gifted or inherited property to uphold the trial court's ultimate decision. In fact, we have stated that cases establishing the transmuting of gifted or inherited property into joint property are not applicable out of that context. ***Gardner***, 190 Wis. 2d at 236. But while those cases do not control this one, they nonetheless are generally instructive as to parties' donative intent. Ascertaining donative intent is a question of fact. *See* ***Derr***, 280 Wis. 2d 681, ¶¶25-27.

¶22 Rose disputes that she gifted any interest to Tony, asserting that she merely titled property in that manner to protect Tony in the event of her death.

She argues that ***Weberg v. Weberg,*** 158 Wis. 2d 540, 463 N.W.2d 382 (Ct. App. 1990), is a case in point. There, the totally and permanently disabled husband deposited a worker's compensation award into the parties' joint account. ***Id.*** at 543, 550. At divorce the wife claimed the settlement became divisible property by commingling the otherwise separate asset with a marital asset. ***Id.*** at 550. The trial court found, based on the husband's testimony, that the funds had been deposited in the joint account only so that the wife would be protected should he die, and that the funds were not commingled with marital property. ***Id.***

¶23 ***Weberg*** must be read with the standard of review firmly in mind. The ***Weberg*** trial court treated the commingling as a question of fact relevant to the husband's donative intent. *See* ***id.*** at 550-52. On review, the court of appeals did not decide that retitling due to an asserted desire to financially protect a spouse renders an asset indivisible as a matter of law; rather, it said such a finding was not clearly erroneous. ***Id.*** at 552. It thus upheld as a proper exercise of the trial court's discretion the determination that the award remained the husband's separate property. ***Id.*** We do not read ***Weberg*** as requiring a trial court to accept a spouse's testimony as to donative intent. As we said in ***Derr***:

> We glean from … cases [such as ***Weberg***] and normal rules of appellate review the following. Circumstantial historical facts may give rise to the legal presumption that an owning spouse gifted property to the marriage. This presumption arises if the owning spouse acts in a manner that would normally evince an intent to gift. However, because donative intent is ultimately a question of subjective donative intent, other evidence may persuade a circuit court that the owning spouse … subjectively intended that gifting not occur. In this circumstance, donative intent is lacking and the property remains non-divisible. At the same time, circuit courts are not obliged to accept the testimony of an owning spouse about his or her subjective thoughts. If a circuit court makes an express factual finding that a spouse consciously did [or did not] intend to gift … we will accord that finding deference. If the court does not make an

> express factual finding, we will normally assume fact finding consistent with the court's ultimate decision. For example, *if the record contains evidence of subjective thoughts tending to rebut a presumption of donative intent [but the circuit court] … makes no express findings regarding this rebuttal evidence, and … determines there was a gift, then we will normally assume the circuit court implicitly found the rebuttal evidence lacking in credibility.*

Derr, 280 Wis. 2d 681, ¶40 (emphasis added).

¶24 Here, Rose has not carried the burden of demonstrating that the disputed property should not have been divided. The Agreement classified, but did not divide, Rose's and Tony's property. Importantly, although it specified that it applied in the event of divorce, the Agreement did not state that tracing should determine property division. If maintaining a given asset as her individual property despite a title suggesting otherwise was Rose's intent, the Agreement could have been drafted with greater precision to better reflect it. *See*, *e.g.*, ***Gardner***, 190 Wis. 2d at 238 (where the parties' agreement provided that, upon divorce, the husband "shall retain the primary residence of the parties regardless of who has title"). Despite the parties' sharp disagreement as to the interpretation of the Agreement, the underlying facts are undisputed: Rose chose to use her individual property to purchase the assets in dispute and chose again to title them jointly with Tony.

¶25 The trial court found that Rose was "careful, calculating and methodical" in managing her "all aspects of her life and finances" and also was well acquainted with the legal system through the parties' involvement in numerous lawsuits. From that, the court found incredible Rose's testimony that she titled assets jointly only to protect Tony in the event of her death, not to make a gift to him, and also found it incredible that a person with Rose's demonstrated business acumen in all other areas of her finances would have titled these

substantial assets in one way while expressing a different ownership intent. The court was not obliged to accept Rose's testimony about her subjective thoughts as the benchmark for the property division. *See* ***Derr***, 280 Wis. 2d 681, ¶40.

¶26 Moreover, Rose's Dairy Source earnings were not the sole source of the funds used to purchase the disputed assets. The 1114 account also was fed by the proceeds of the sale of the Delavan home, which Rose agrees was marital property, and the entire Berner Cheese settlement, one-third of which the trial court held belonged to Tony as one of three named parties in the lawsuit and on the settlement documents.

¶27 Rose next asserts that the trial court erred when it disregarded her uncontradicted testimony that her joint titling of assets was consistent with her estate planning goals. She submits that a court cannot disregard uncontroverted testimony unless there is "something in the case which discredits the testimony or renders it against reasonable probabilities," and unless the court explains why it found the testimony improbable or the witness not credible. *See* ***Ashraf v. Ashraf***, 134 Wis. 2d 336, 345, 346, 397 N.W.2d 128 (Ct. App. 1986).

¶28 Rose quotes ***Ashraf*** correctly but her argument fails nonetheless. First, her testimony was not uncontradicted. The Lake Geneva property deed—also admitted into evidence—recited that the home was titled as survivorship marital property. Likewise, there was testimony that various other assets were jointly held. Evidence of one type, even when from an expert, may be contradicted by evidence of another type, as recognized in ***Ashraf*** by the broad phrase "something in the case" which renders the testimony incredible or improbable. ***Schwegler v. Schwegler***, 142 Wis. 2d 362, 368, 417 N.W.2d 420 (Ct.

App. 1987). Finally, as we have noted, the court well explained why it found this portion of Rose's testimony incredible.

¶29 Rose launches a similar argument as to the Berner Cheese settlement. She contends that the trial court wrongly "disregarded the plain language of the settlement agreement" and the testimony of her expert, George Kiskunas, that the settlement was payable solely to Dairy Source, Inc. Rose looks to language stating that the settlement figure "represents complete compensation for all harm which Dairy Source may have suffered." Thus, Rose argues that the court erred by treating the parties' share of the settlement as a marital asset and awarding one-third to Tony. Finally, Rose argues that the court erred in failing to apportion the tax liability related to this asset. We disagree with her entire argument.

¶30 First, various trial exhibits contradict the evidence Rose contends is uncontradicted. The opening sentence of the settlement document, for instance, states that the agreement and release "is made by … Dairy Source, Inc., Rose Steinmann *and Tony Steinmann* (hereinafter referred to as 'Dairy Source') …." (Emphasis added.) The signature page of that document bears three discreet signature lines: one for Dairy Source, one for Rose and one for Tony. Also, both Rose and Tony protested the IRS's "thirty-day letter" which, as Tony observes, was not a final determination but advised only of "proposed changes." We agree that Rose should not be heard to complain that the court gave little weight to an IRS determination to which she herself objected. Tony's protest letter explains that the settlement agreement "did not allocate amounts among the various claims settled" although it was a global settlement made to resolve claims made by Dairy Source, Rose and Tony. This documentary evidence therefore stood in contrast to Kiskunas' testimony. In fact, Kiskunas' own report admitted into evidence

acknowledges that, because Dairy Source is a Subchapter-S corporation and Rose and Tony filed jointly, all three face "potential exposure to income taxes, penalties, interest, and other costs of the ongoing IRS audit."

¶31 Second, we disagree that the trial court erred in classifying the settlement as a marital asset and awarding one-third to Tony. The settlement agreement and release was entered into by all three claimants: Dairy Source, Rose and Tony. While Berner paid the settlement monies Rose, she deposited the sum into the 1114 account, the same account into which were deposited the proceeds from the sale of the jointly owned Delavan home. We hold that the trial court properly considered the settlement as a divisible marital asset.

¶32 Third, we disagree that the trial court sidestepped its obligation to consider the tax consequences to each party. *See* WIS. STAT. § 767.255(3)(k). Contrary to Rose's assertion, the trial court expressly acknowledged the pending tax dispute caused by the parties' failure to report the settlement as income. The court, however, refused to speculate on the ultimate financial penalty on the still-incomplete IRS audit, stating that since both Tony and Rose did not report the settlement, both likely faced a penalty, making the impact on property division effectively a wash. The court was not bound to accept Kiskunas' opinion as to how the IRS would rule. The credibility of witnesses and the weight to be attached to that evidence is a matter uniquely within the discretion of the finder of fact. ***Laribee v. Laribee***, 138 Wis. 2d 46, 54-55, 405 N.W.2d 679 (Ct. App. 1987). Moreover, a court is not obliged to consider the tax consequences of a hypothetical or theoretical disposition of marital property. ***Ondrasek v. Ondrasek***, 126 Wis. 2d 469, 480, 377 N.W.2d 190 (Ct. App. 1985). As we have said in a different context, while our trial courts have the authority to address tax issues such as whether a taxpayer will owe a penalty, until the IRS finally rules, *requiring* the

trial court to decide would obligate it to make findings based on speculation or, at best, educated guesses about how the tax issue will be resolved. ***Logemann Bros. Co. v. Redlin Browne, S.C.***, 205 Wis. 2d 356, 363, 556 N.W.2d 388 (Ct. App. 1996). "[J]ustice is better served to simply permit the IRS to make the call…. [In so doing,] our trial courts are assured that society's *most qualified* expert in tax law will be making the definitive determination …." ***Id.***

¶33 Rose next argues that the trial court's refusal to permit tracing resulted in "double counting" assets that, by the time of trial, no longer were in their original form. For example, because Rose had used part of the Berner Cheese settlement to finance the purchase of the Lake Geneva house, when Tony was awarded half the proceeds from the sale of that house and one-third of the Berner Cheese settlement, he actually was awarded the asset twice, albeit in two different forms. Tony concedes the error, but argues it was harmless because the assets involved have no impact on the equalizing payment Rose was ordered to make. An error is harmless if it does not affect the substantial rights of the party seeking to set aside the judgment. *See* WIS. STAT. § 805.18(2). An error affects the substantial rights of a party when there is a reasonable possibility—a possibility sufficient to undermine confidence in the outcome—that the error contributed to the outcome of the action. ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768.

¶34 We agree with Tony. The trial court ordered Rose to make an equalizing payment only in regard to jewelry and household items. Without an equalizing payment involving the disputed assets, their having been double counted does not matter in the context of the whole judgment. The error is harmless.

¶35 Finally, Rose argues that, absent a showing of extreme financial hardship or material injury to the property itself, the trial court erred in finding that the Lake Geneva residence was a drain on the marital estate requiring its sale before trial. Per the family court commissioner order, the mortgage, real estate taxes, utilities, maintenance and related expenses were paid from the 1114 account, and the trial court found that those expenses totaled over $14,000 per month. The court also found that although the 1114 account was solely in Rose's name, it included marital funds from the sale of the prior marital residence and possibly also "other marital monies." That account being the parties' sole liquid asset, the court found that the cost of keeping and maintaining the residence was seriously depleting the marital estate in the short term and ordered its sale. Dairy Source ultimately purchased the home for Rose's use.

¶36 It is unclear what remedy Rose seeks at this juncture. Even were we to agree with Rose, we can hardly "unring the bell" and order a completed sale undone. A better option would have been for Rose to seek leave to appeal the nonfinal order she now challenges. *See* WIS. STAT. RULE 809.50. Regardless, even as to the merits, we see no error. As we noted, the trial court found that the over $14,000 monthly expense of the Lake Geneva property placed a serious financial drain on the marital estate. During the pendency of a divorce, a court may make just and reasonable orders to assure that the marital assets are protected. *See* WIS. STAT. § 767.23(1)(h). We see no reversible error in the trial court's determination to order the sale of the residence.

Maintenance

¶37 The trial court ordered Rose to pay Tony maintenance of $2000 a month for ten years. She observes that with this order, the court reversed its own

temporary no-maintenance award, which itself had reversed the court commissioner's maintenance order. She argues that this back-and-forth occurred without new evidence or a substantial change in circumstances.

¶38 As a threshold matter, Rose does not explain why the trial court needed to find a substantial change in circumstances to modify the temporary order. The "substantial change in circumstances" test is the framework we apply when analyzing a challenge to a final order. *See* WIS. STAT. § 767.32(1).

¶39 Furthermore, the determination of the amount and duration of a maintenance award is entrusted to the trial court's discretion, and we will not reverse absent a misuse of discretion. ***Grace v. Grace***, 195 Wis. 2d 153, 157, 536 N.W.2d 109 (Ct. App. 1995). Where it appears that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is one a reasonable judge could reach and that is consistent with applicable law, we will affirm the decision as a proper exercise of discretion. *See* ***id.*** We conclude that the court complied with this procedure when making the ultimate maintenance award.

¶40 We begin by considering whether the trial court's application of the factors delineated in WIS. STAT. § 767.26 achieves the dual objectives of maintenance: fairness and support. ***Forester v. Forester***, 174 Wis. 2d 78, 84, 496 N.W.2d 771 (Ct. App. 1993). The court acknowledged that its earlier nonfinal order had discontinued previously ordered maintenance to Tony, but that the eight-day trial gave a more complete picture of the parties' financial status and of the weight to be given to the various statutory factors. For example, evidence was presented that Rose's stream of income, including salary, personal use of Dairy Source's yacht and private plane, and Dairy Source's payment of all of her

housing costs, was several times the $120,000 earnings portrayed in her financial disclosure at the hearing six months earlier. The court methodically examined each of the nine mandatory factors on the record and articulated its reasons for determining that they weighed in favor of granting Tony limited-term maintenance. The court found that both parties were in good health, were working successfully in their chosen field, and needed no further education to advance their careers. It also found that: ten years is a marriage of "considerable" length during which the parties had worked closely together; the property division driven by the parties' Agreement favored Rose; Tony's current salary permitted self-sufficiency, but not at a level reasonably comparable to the "opulent lifestyle" the parties enjoyed together; Rose would realize a tax benefit through maintenance payments to Tony; and the parties' combined efforts fostered Dairy Source's success and enhanced their mutual lifestyle. The court determined that maintenance of $2000 per month for ten years met both the support and the fairness objectives of maintenance because it would make the parties' incomes roughly approximate for a period close to the length of the marriage. We see no improper exercise of discretion.

CONCLUSION

¶41 At divorce, property division and maintenance largely are discretionary, within the prescribed statutory framework. Rose's tracing argument fails because both the parties' Agreement and Rose's own actions belie an intent to trace ownership. More, we have no precedent for conducting tracing outside the context of gifted or inherited property. Thus, Rose has not met her burden of demonstrating that the disputed property either remains or reverts to individual property. We also hold that the trial court did not err in the exercise of its discretion with regard to the maintenance award. We affirm the judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.