

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 16, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-1983
STATE OF WISCONSIN**

Cir. Ct. No. 99FA008

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

MARY ANN STRNAD,

PETITIONER-APPELLANT,

V.

EDWARD STRNAD,

RESPONDENT-RESPONDENT.

APPEAL a from judgment of the circuit court for Kewaunee County: PETER C. DILTZ, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Mary Ann Strnad appeals the property division granted in a divorce judgment. She argues that the trial court erroneously included as property subject to division the sum of \$7,489 she received as inheritance. We

conclude that the trial court correctly determined that her inheritance retained its character as non-divisible property. We disagree, however, that the sum cannot be traced and identified. Therefore, we reverse in part and remand for proceedings consistent with our opinion.

¶2 Mary Ann and Edward Strnad were married in 1944.¹ They acquired a number of parcels of real estate during the course of their marriage. These included the 116-acre “home farm,” an adjacent twenty-acre parcel known as “Butch’s place,” a farm known as the “Opicka farm” and a parcel paid for in part with inheritance funds, referred to as “Mary Ann’s home.”

¶3 In 1982, Mary Ann received an inheritance of \$7,489.31. She deposited this sum into a bank account held jointly with Edward, but advised him that he should never withdraw the money. No funds were ever added or withdrawn from the initial deposit. In May 1989, Mary Ann withdrew the funds and deposited them in an account held in her own name.

¶4 In December 1990, the parties separated. Mary Ann moved from the home farm to live with her son, Edward, Jr., who was disabled. She also began employment as a nursing assistant. By 1991, the initial \$7,489.31 had appreciated to \$15,000, attributable solely to interest income. Mary Ann withdrew the sum to purchase a run-down \$15,500 house that she titled solely in her name, which came to be known as “Mary Ann’s home.” She added a \$500 personal check to make up the purchase price. Mary Ann did not move into the house right away, but

¹ As to be expected in a lengthy marriage, the record presents a lengthy fact history. We limit our recitation, however, to those facts pertinent to the resolution of the single issue before us.

continued living with Edward, Jr., while using her earnings to extensively remodel the house. Eventually, in October 1995, after the home was extensively remodeled, she and her son moved in.

¶5 In 1999, Mary Ann petitioned for divorce. At the time of trial, the house was appraised at \$85,000. Following trial, Mary Ann filed a written “final argument,” in which she argued that this asset was traceable to her inheritance. She stated: “Petitioner’s position is that she should be awarded this parcel of property as her separate property.” Alternatively, she requested that the court order the property sold “with credit given to her for the money put into the property.” She did not want to be awarded the property at a value of \$85,000.

¶6 The trial court entered the following order with respect to her request: “Given the labor and hard earned money that petitioner put into this property, if she does not want it at respondent’s value, she should be accommodated. ... Petitioner is awarded the net proceeds of the sale, subject to certain qualifications specified below.”

¶7 The court found that Mary Ann’s inheritance was separate non-divisible property and, although placed in a joint account, had retained its identity and character while in the account. The court stated:

It was placed in a joint bank account with [Edward]. However, his testimony leads to the conclusion that [Edward] never had anything to do with these funds and that there was no donative intent on petitioner’s part, or even a belief by respondent that there was. However, when petitioner used these funds to buy her house in 1991, the value had increased to \$15,000. Of that, at least some of the accrued interest must have been marital income, creating a marital property component. After the purchase, the property increased in value, to \$85,000

¶8 The court determined that the increase in the property's value was derived from four components: "Petitioner's labor, labor contributed by others, petitioner's income invested in materials and labor, and market or economic factors." The court further found that the "evidence does not allow attributing a certain amount of the increased value to any specific factor. Additionally, the income factor is clouded by the marital nature of that income."

¶9 The court concluded that Mary Ann's arguments

defeat the change of character claim, [but] they fail in regard to identity. Without knowing the non-marital value that went into her home purchase, and not knowing what caused the increase in value (or, until it is sold, the amount of increase), I cannot find that the original \$8,000 acquired as a result of [inheritance] has sufficient present identifiable form such that I can value and properly assign it. It has become marital property, subject to a presumed equal division. Whatever that unidentifiable value is, I do recognize it as "significant" to be considered with other relevant factors, in determining whether to deviate from an equal division.²

¶10 The court found that the marital estate had a value of \$500,000. Considering the fifty-three-year marriage, the presumption of a long-term economic partnership inherent in marriage, and numerous factors, the court determined that the original \$7,489 contribution did not warrant a deviation from an equal property division. The court ordered that property be sold, and that any proceeds beyond an equalizing payment from Edward to Mary Ann should be divided equally.

² We conclude that the court's reference to \$8,000 referred to Mary Ann's \$7,489.

¶11 Generally, property division is addressed to trial court discretion. *Brandt v. Brandt*, 145 Wis. 2d 394, 406, 427 N.W.2d 126 (Ct. App. 1988). An exercise of discretion premised upon factual or legal error constitutes an erroneous exercise of discretion. *Id.* Whether a party has established that property is gifted or inherited and therefore not subject to division under WIS. STAT. § 767.255(2)(a) presents a question of law and we need not defer to a trial court's conclusion. *Id.* “We view a tracing or commingling determination by a trial court as presenting a question of fact.” *Id.* at 406-07. Such a finding will not be set aside unless clearly erroneous. WIS. STAT. § 805.17(2).

¶12 Inherited property, or property acquired “[w]ith funds acquired” through inheritance, is not subject to division absent a finding of hardship. WIS. STAT. § 767.255(2).³ Nonetheless, if the property has lost its character or identity

³ WISCONSIN STAT. § 767.255(2) provides:

(2)(a) Except as provided in par. (b), any property shown to have been acquired by either party prior to or during the course of the marriage in any of the following ways shall remain the property of that party and is not subject to a property division under this section:

....

2. By reason of the death of another, including, but not limited to, life insurance proceeds; payments made under a deferred employment benefit plan, as defined in s. 766.01 (4)(a), or an individual retirement account; and property acquired by right of survivorship, by a trust distribution, by bequest or inheritance or by a payable on death or a transfer on death arrangement under ch. 705.

3. With funds acquired in a manner provided in subd. 1. or 2.

(continued)

through commingling with divisible property, then all the property is subject to division. *Trattles v. Trattles*, 126 Wis. 2d 219, 225, 376 N.W.2d 379 (Ct. App. 1985). Inherited property is excluded from division only if its character and identity have been preserved. *Brandt*, 145 Wis. 2d at 410-11.

¶13 “Character addresses the manner in which the parties have chosen to title or treat gifted or inherited assets.” *Id.* at 410. Changing the property's character occurs when, for example, a party transfers inheritance into joint tenancy or uses it to purchase property for the mutual enjoyment and use of the marriage. *Trattles*, 126 Wis. 2d at 225-26.

¶14 “Identity, on the other hand, 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 410-11.

¶15 Case law “tend[s] to make character ... rather than identity, the controlling issue in most cases.” *Trattles*, 126 Wis. 2d at 228. Commingling is not per se fatal to the exempt status. The inquiry is whether the gifted component can be valued. *Brandt*, 145 Wis. 2d at 412. “Our task on appeal is not to independently perform a tracing exercise. Rather, we must determine if the record supports the court’s finding.” *Id.* at 412.

¶16 Here, the trial court found that Mary Ann did not change the character of her inheritance because she deposited it into the joint account with the

(b) Paragraph (a) does not apply if the court finds that refusal to divide the property will create a hardship on the other party or on the children of the marriage. If the court makes such a finding, the court may divest the party of the property in a fair and equitable manner.

proviso that Edward would not have use of it. She later withdrew it to invest in separate property. The court was entitled to find that the testimony rebutted any presumption of donative intent on the part of Mary Ann. We conclude the record supports the trial court's finding that the inheritance retained its separate character.

¶17 We further conclude, however, that the record does not support the trial court's determination that Mary Ann's inheritance can no longer be traced and identified. Mary Ann claims as separate property only the \$7,489 that she inherited. She is not claiming the interest after she deposited it in the bank or appreciation after she invested it in her home. Thus, the sum of \$7,489 is readily determinable and not so commingled with divisible property that it cannot be traced or identified.

¶18 Because Mary Ann's inheritance has not lost its character and is not so commingled as to lose its identity, we conclude that the trial court erroneously determined that it was subject to division under WIS. STAT. § 767.255. We reject Edward's "de minimus" argument.⁴ Therefore, we reverse and remand with directions that Mary Ann should have been credited the sum of \$7,489.⁵

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

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

⁴ Also, Edward does not suggest any issue of hardship. See WIS. STAT. § 767.255.

⁵ Because this sum was previously included in the marital estate and divided equally, Mary Ann is entitled to the remaining one-half of \$7,489.

