COURT OF APPEALS
DECISION
DATED AND FILED

April 13, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1603 **Cir. Ct. No. 2007FA838**

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

IN RE THE MARRIAGE OF:

JENNIFER ANN RAMAGE,

PETITIONER-RESPONDENT,

V.

DANIEL RAY RAMAGE,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Daniel Ray Ramage appeals a judgment of divorce from Jennifer Ann Ramage. Daniel argues that the trial court erred by concluding

that the residence and its furnishings were Jennifer's individual property not subject to division because they were purchased with Jennifer's personal injury settlement. Daniel contends Jennifer demonstrated donative intent by depositing the settlement proceeds into a joint account, jointly titling the house and allowing him full use and enjoyment of the household items. We disagree and affirm.

¶2 The relevant facts are undisputed.[1] Daniel and Jennifer married in Illinois in 1995. They have four children, one emancipated. They moved to Oshkosh in June 2006. Earlier in 2006, Jennifer received a settlement in a personal injury action that arose from a March 2000 incident in which she suffered a serious nerve injury. The original named plaintiffs in that lawsuit were Jennifer, Daniel and their youngest child, with whom Jennifer was pregnant when she was injured. Daniel's and the child's claims later were dismissed. The approximately $276,000 settlement check was made out only in Jennifer's name. She and Daniel opened a joint account in an Illinois bank and deposited the check. Soon after, they opened a joint account in a Wisconsin bank and deposited the settlement proceeds. They then used $164,500 to purchase a house and approximately $22,000 to furnish it. The family lived off what remained in the joint account.

¶3 Jennifer filed for divorce in December 2007, and sought a restraining order against Daniel at the same time. Daniel acknowledged at trial that he had been arrested and jailed numerous times over the years for domestic violence.

[1] An appellate brief must contain "appropriate references to the record," *see* WIS. STAT. RULE 809.19(1)(d), (3)(a)2., so as to inform this court where the facts asserted may be found in the record. Except for one, all citations in Jennifer's Statement of Facts are to the appendices alone. Her appendix also includes a number of documents not included in the record. Assertions of fact that are not part of the record will not be considered. ***Balele v. Wisconsin Pers. Comm'n***, 223 Wis. 2d 739, 752, 589 N.W.2d 418 (Ct. App. 1998).

The only issues for trial were property division, including the homestead, and allocation of the parties' approximately $38,000 in debt.

¶4 The trial court determined that Jennifer's personal injury settlement was her individual property, that the home and its contents were purchased with identifiable proceeds from the settlement, and that jointly titling the settlement proceeds or the assets they purchased was insufficient to change their identity as Jennifer's individual property. Accordingly, the court awarded Jennifer the residence and the household items purchased with the settlement proceeds. It concluded, however, that the remainder of the settlement was "so commingled with marital funds that it would be impossible to separate."[2] It ordered no equalizing payment. Finally, the court divided the marital debt between Jennifer and Daniel, roughly sixty percent and forty percent, respectively.

¶5 On appeal, Daniel first argues that the trial court wrongly concluded that the assets purchased with Jennifer's personal injury settlement monies are individual property not subject to division. We disagree.

¶6 All property of the parties to a divorce—other than that acquired through gift, bequest, devise or inheritance—is presumed subject to equal division. WIS. STAT. § 767.61(2)-(3) (2009-10).[3] We also presume that a person awarded a personal injury settlement owns those funds individually. *See* ***Richardson v.***

[2] Jennifer's counsel represents that in addition to awarding Jennifer the house and its contents, the trial court "determined that Jennifer was entitled to leave the marriage with the remainder of the personal injury settlement funds, no matter what shape they took at present." The source of this claim is mystifying. And unless we misconstrue what counsel meant to say, her portrayal of the court's conclusion is troubling.

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Richardson, 139 Wis. 2d 778, 780-81, 407 N.W.2d 231 (1987). The trial court may alter the presumed retention of the settlement by the injured spouse after considering any special circumstances vis-à-vis the relevant statutory factors. *See* ***Krebs v. Krebs***, 148 Wis. 2d 51, 58, 435 N.W.2d 240 (1989).

¶7 Next, Daniel concedes that Jennifer's personal injury settlement would have been properly excluded if its identity and character as individual property had been preserved. He contends, however, that the trial court failed to require her to demonstrate that the exempt assets maintained their identity and character with no evidence of donative intent. We disagree.

¶8 The "identity" inquiry is a matter of tracing the asset. *See* ***Wright v. Wright***, 2008 WI App 21, ¶12, 307 Wis. 2d 156, 747 N.W.2d 690. The uncontroverted evidence was that Jennifer received a settlement check in her sole name, the parties deposited the check into a newly opened joint account, withdrew an amount on May 30, 2006 to purchase a house, and spent documented sums to furnish it. The purchase of the house and its furnishings easily can be traced to Jennifer's personal injury settlement.

¶9 Daniel argues, however, that the character of Jennifer's individual property was transmuted to divisible property through the manner in which the parties chose to title and treat the potentially exempt asset. The "character" inquiry is one of "donative intent." *See* ***id.*** "[D]onative intent is presumed, subject to rebuttal by 'sufficient countervailing evidence[,]'" when the owning spouse acts in a manner normally evincing an intent to gift property to the marriage. ***Derr v. Derr***, 2005 WI App 63, ¶33, 280 Wis. 2d 681, 696 N.W.2d 170 (citation omitted). Historical facts—such as depositing non-divisible money into a joint bank account or expending non-divisible funds to acquire property and goods

that generally are used for the parties' mutual benefit—may give rise to the legal presumption of donative intent. ***Id.***, ¶¶36-37, 40. Donative intent ultimately is a question of subjective intent, however. ***Id.***, ¶25.

¶10 The evidence here was that the account into which the settlement proceeds were deposited, the cashier's check used to purchase the residence and the deed for the residence all were titled jointly. Also, most of the receipts for the furniture and furnishing purchases list both parties' names. Nonetheless, Jennifer testified that she at all times considered the home and its contents her personal property, never signed any settlement agreements making the property Daniel's and never intended to gift it to him. For his part, Daniel testified that he cashed out his 401(k) from his Illinois job and deposited it and his Wisconsin paychecks[4] into the joint account and that, for the year and a half that he lived in the home, he contributed to its maintenance and upkeep and had full use and enjoyment of it.

¶11 The court implicitly found more persuasive Jennifer's testimony about her subjective intent. Although the court did not make an express factual finding in that regard, we assume fact finding consistent with the court's ultimate decision. *See* ***id.***, ¶40. Any evidence of Jennifer's donative intent may have been undercut by the evidence of Daniel's violence against her. *See* ***Schwegler v. Schwegler***, 142 Wis.2d 362, 368, 417 N.W.2d 420 (Ct. App. 1987) (stating that evidence of one type may serve to contradict evidence of another type). Similarly, Daniel's claim that he contributed to the home's upkeep and maintenance may have been eroded by contradictory information provided to the court in the report

[4] Daniel was unemployed from June 10, 2006 until June 2007. He moved out of the home on December 5, 2007.

of the children's guardian ad litem. The determination of credibility is a matter within the trial court's discretion. ***Steinmann v. Steinmann***, 2008 WI 43, ¶55, 309 Wis. 2d 29, 749 N.W.2d 145.

¶12 Although it did not undertake an express point-by-point analysis of each of the WIS. STAT. § 767.61(3) factors, we are satisfied that the trial court properly considered them. The result was a reasoned and reasonable decision.

By the Court.—Judgment affirmed.

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